(3)

No. 85-969

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LAWRENCE E. GRAY, EDWARD J. MURTY, JR.
and PETER MCC. GIESEY,
Petitioners,

v.

OFFICE OF PERSONNEL MANAGEMENT,
AN AGENCY OF THE U.S. GOVERNMENT,
Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

FRANCIS A. O'BRIEN, P.C.
(Counsel of Record)
JAMES H. CURTIN
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

6 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-969

LAWRENCE E. GRAY, EDWARD J. MURTY, JR.
and PETER MCC. GIESEY,
Petitioners,

v.

OFFICE OF PERSONNEL MANAGEMENT,
AN AGENCY OF THE U.S. GOVERNMENT,
Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Rule 22.6, petitioners file this supplemental brief in support of their petition for a writ of certiorari in order to inform the Court of the existence of newly discovered statutory authority which petitioners believe is dispositive of the question presented for review. The controlling statute is 5 U.S.C. § 559, Section 12 of the Administrative Procedure Act, which provides, in pertinent part, as follows:

> *Subsequent statute may not be held to supersede or modify* this subchapter, *chapter 7*, Sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of Section 5335(a)(B) of this title that relate to administrative law judges, *except to the extent that it does so expressly.*

5 U.S.C. § 559 (1982) (emphasis added). The phrase "chapter 7" refers to Sections 701 through 706 of Title

5 of the United States Code, those sections of the Administrative Procedure Act that grant a right of judicial review to persons—like petitioners—injured by arbitrary and capricious government conduct. In language that could hardly be clearer, Congress, in the above-quoted section, has instructed the courts not to hold that statutes enacted after the Administrative Procedure Act—such as the Civil Service Reform Act of 1978—"supersede or modify" the right to review granted by Sections 701 through 706 unless they do so *expressly*.[1]

This instruction is dispositive of petitioners' claim that they are entitled to sue the Office of Personnel Management in federal district court because of OPM's failure to direct their promotions in 1981. Petitioners have consistently argued that the creation by Congress in 1978 of the Merit Systems Protection Board and the Office of Special Counsel did not extinguish their pre-existing right under Sections 701 through 706 of the APA to seek direct judicial review in district court of OPM's unlawful failure to direct their promotions. To date, petitioners have been denied a judicial forum for their claims on the ground that the "exhaustive remedial scheme" of the CSRA impliedly precluded judicial review under the APA. *See Carducci v. Regan*, 714 F.2d 171, 174 (D.C. Cir. 1983).

Petitioners have already demonstrated that the "clear and convincing" evidence test applicable to preclusion of judicial review as developed by this Court in the *Abbott Laboratories* line of cases has not been met here. (Petition at 7-9.) It is now apparent, however, that even more than "clear and convincing" evidence of congressional intent is required to preclude a right to judicial review

[1] Significantly, the specific statutory sections referred to in 5 U.S.C. § 559 focus on administrative law judges. This is further support for petitioners' argument that the Civil Service Reform Act of 1978 does not bar suits by ALJs under Sections 701 through 706 of the APA. (Petition at 10-14).

granted by Chapter 7 of the APA. Section 559 mandates that before a court withdraws a right to judicial review granted by Chapter 7 it must find *express* language in a superseding statute that Congress intended such a result. There simply is no such *express* language in the Civil Service Reform Act of 1978.

Interestingly, not one of the ten circuits which to date have considered the relationship of the APA-granted right of judicial review and the CSRA has discussed the relevance of Section 559 to the question of preclusion. Indeed, counsel for petitioners first learned of the existence of Section 559 a week and a half after petitioners filed for a writ of certiorari. Believing Section 559 to be dispositive of the issue at hand, petitioners' counsel notified the Solicitor General's office of this newly-discovered statutory authority and undertook the filing of this supplemental brief.

Although petitioners only recently learned of Section 559, this Court has applied it on a number of occasions in circumstances remarkably similar to those at hand. *See Rusk v. Cort*, 369 U.S. 367 (1962); *Marcello v. Bonds*, 349 U.S. 302 (1955); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955). The *Shaughnessy* case is especially apposite.

In *Shaughnessy*, the Court considered the effect of the Immigration and Nationality Act of 1952 on an alien's right to judicial review under the APA. 349 U.S. at 50. The Court observed that the purpose of § 10[2] and § 12[3] of the Administrative Procedure Act

> was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act.

[2] Section 10 of the APA contained the judicial review provisions which since have been codified at 5 U.S.C. §§ 701 through 706.

[3] Section 12 of the APA has been codified at 5 U.S.C. § 559.

349 U.S. at 51. As a result, said the Court, the judicial review provisions of the APA must be given a "hospitable" interpretation. *Id.* Finding that there was no language in the 1952 Immigration Act which " 'expressly' supersedes or modifies the expanded right of review granted by § 10 of the [APA]," the Court held that the 1952 Immigration Act did not eliminate "the [APA] right of judicial review in whole or in part." *Id.* The Court found its construction of the two acts to be "more in harmony with the generous review provisions" of the APA than a construction denying judicial review. *Id. Accord Rusk v. Cort*, 369 U.S. 367, 379-380 (1962) ("the teaching of [*Shaughnessy*] . . . is that the Court will not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions under the 1952 [Immigration] Act in the absence of clear and convincing evidence that Congress so intended.") *Cf. Marcello v. Bonds*, 349 U.S. 302, 309 (1955) (holding that the 1952 Immigration Act's hearings provisions superseded those found in Sections 5, 6 and 7 of the APA where Section 242 of the Immigration Act expressly stated that its procedure "shall be the sole and exclusive procedure for determining the deportability of an alien under this section."). *See also Benton v. United States*, 488 F.2d 1017, 1023-24 (Ct. Cl. 1973) (holding that a 1956 amendment to the Civil Service Retirement Act providing that Civil Service Commission decisions were not subject to judicial review did not supersede Section 11 of the APA requiring a hearing on the record before removal of a hearing examiner where the 1956 amendment "contained no express language modifying Section 11 of the APA and, in fact, made no reference whatever to Section 11").

Petitioners respectfully urge that Section 559, as interpreted by this and other courts in cases like *Shaughnessy* and *Benton*, requires a determination that petitioners are entitled to seek judicial review of their claims

against OPM in federal court. To hold otherwise would be to ignore the clear mandate of Congress that such a right to judicial review not be eliminated absent *express* congressional language to that effect. There is neither "express" language nor even "clear and convincing" evidence in the CSRA showing that Congress intended to remove from petitioners their right to judicial review under Sections 701 through 706 of the APA. Accordingly, it was error for the lower courts to hold that petitioners' right of review had been taken away by the CSRA.

CONCLUSION

For the above reasons, as well as the reasons stated in their petition for a writ of certiorari, petitioners respectfully request that the Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit entered in this case. In the alternative, petitioners request that the Court remand this case to the Court of Appeals for rehearing en banc to decide whether 5 U.S.C. § 559 requires a finding that petitioners are entitled to judicial review under Sections 701 through 706 of the APA.

Respectfully submitted,

FRANCIS A. O'BRIEN, P.C.
(Counsel of Record)
JAMES H. CURTIN
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800
Attorneys for Petitioners

Dated: January 6, 1986